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No. 445

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

BROOKLYN SAVINGS BANK,

Petitioner,

v.

WILLIAM J. O'NEIL.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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No.

BROOKLYN SAVINGS BANK,

Petitioner,

WILLIAM J. O'NEIL.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

Your petitioner, Brooklyn Savings Bank, respectfully prays that a writ of certiorari be issued to review the decision and judgment of the Court of Appeals of the State of New York in the above cause of June 14, 1944, and the final judgment entered thereon in the Municipal Court of the City of New York on August 17, 1944.

Opinions Below.

The Municipal Court of the City of New York, Borough of Manhattan, First District, dismissed the complaint without opinion. The opinion of the Appellate Term (R. 79-80)

is reported at 180 Misc. 542. The majority and dissenting opinions in the Appellate Division, First Department (R. 90-102), are reported at 267 App. Div. 317. The Court of Appeals of the State of New York wrote no opinion.

Jurisdiction.

The Court of Appeals of the State of New York—which is the highest court of the State in which a decision in the suit could be had—issued its remittitur on June 14, 1944 (R. 105). The order of the Municipal Court of the City of New York making the order of the Court of Appeals the order of the Municipal Court of the City of New York was entered on August 17, 1944 (R. 107). The final judgment of the Municipal Court of the City of New York was entered on the same day, August 17, 1944 (R. 110). The jurisdiction of this Court is invoked under section 237(b) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented.

1. Whether employees have any right to sue for statutory liquidated damages for non-payment of overtime under the Fair Labor Standards Act where the employer prior thereto has voluntarily paid the full amount of such overtime.

2. Whether upon such payment a release of any such additional liability does not bar recovery of such damages.

3. Whether, because of the admittedly uncertain coverage of the statute, the imposition of such additional liability in such circumstances is not without due process of law.

Statute Involved.

Pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. §§ 201 *et seq.*) are set forth in the appendix.

Statement.

Respondent was employed as a night watchman at an eleven-story business building at 443 Fourth Avenue, New York City, from November 5, 1938, to August 30, 1940 (R. 19). Petitioner bank, located in Brooklyn (R. 11, 14), is the owner of the building (R. 5). Respondent's terms of employment were subject to collective bargaining agreements (R. 11).

On June 1, 1942, this Court handed down its decision in *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 519, holding that the federal wage and hour act applied to employees at buildings the tenants of which "are principally engaged in the production of goods for interstate commerce." Respondent had left petitioner's employ nearly two years prior thereto (R. 19, 58). Not only were the tenants in the building here involved not engaged in the production of goods for either interstate or intrastate commerce[1] but

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[1] At the trial of the instant case respondent called several employees and one tenant who testified that nine of the twenty-seven tenants of the building (R. 60) dealt in goods which in some part came from outside the state or might be sent beyond the state (R. 25-65). Apart from the lack of qualification of such witnesses to testify as to the nature of the business (R. 27) and their failure to identify the period for which they spoke (R. 53), none of them testified that the tenants were engaged in any actual and substantial production for interstate commerce. There was thus insufficient evidence for coverage either as to goods received or goods sold. As to goods received, the statute applies only to "employees * * * engaged in commerce" rather than necessary to commerce; and the coverage sustained in *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 574-575, is inapplicable because it involved a rate clerk of an interstate bus company. Compare *McLeod* v. *Threlkeld*, 319 U. S. 491. There was no evidence of special orders warranting the coverage sustained in the first two situations discussed in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 566-569, but the instant situation falls rather within the third situation there to the effect that "evidence of a wholly general character * * * lacks that particularity necessary to show that the goods in question were different from goods acquired and held by a local merchant for local distribution" (p. 570). *Cf. Higgins* v. *Carr Bros. Co.*, 317 U. S. 572, 574. As to sales, Section 13(a) (2) of the Act expressly exempts from Sec-

the leases also contained covenants against manufacturing (R. 58) which were enforced (R. 56).[2] Nevertheless—because of the stringent penalties of the statute and the uncertainties and cost of litigation (R. 11-12)—petitioner voluntarily calculated respondent's overtime due if the Fair Labor Standards Act were applicable (which came to $423.16) and, without any demand whatever from respondent (R. 25), sought him out and tendered it to him (R. 23). Respondent, without protest (R. 24), accepted the overtime so calculated and in writing released petitioner "from any and all claims, debts, damages, or liabilities arising out of or in connection with his claims of any kind or character whatsoever growing out of his overtime employment" (R. 11-12, 54-55, 65-66).

Respondent then—without returning the amount so received in settlement (R. 6),[3] without protest to or demand upon petitioner (R. 25), and admitting that the amount of overtime had been correctly calculated in the settlement and fully paid (R. 6)—instituted action in the Municipal Court for the City of New York for the recovery of liquidated damages in an amount equal to the sum he had already been paid ($423.16) plus attorney's fees and interest from the time his employment ceased (R. 7). The trial

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tion 7 "any employee in any retail establishment the greater part of whose selling • • • is in intrastate commerce." In order that respondent be covered by the Act it was necessary—and the case was tried on the theory (R. 25-65)—that he be engaged in an "occupation necessary to the production" (Section 3(j)) "of goods for [interstate] commerce" (Section 7), as this Court held in the *Kirschbaum* case (pp. 524-525).

[2] The leases were introduced (R. 61) and show upon their face that they are the standard form of office lease (R. 56) long in use. It is a matter of common knowledge that union contracts specify different terms and conditions of employment in buildings where manufacturing is permitted. More stringent local health and safety regulations also apply to buildings where manufacturing is permitted.

[3] *Cf. Eclipse Bicycle Company* v. *Farrow*, 109 U. S. 581, 587; *United States* v. *Harvey Steel Co.*, 196 U. S. 310, 315-316; *Vance* v. *Chicago Portrait Co.*, 19 F. 2d 981, 986 (C. C. A. 7, 1927).

court, after hearing the evidence, granted petitioner's motion to dismiss (R. 66-67). The Appellate Term reversed per curiam (R. 79-80; 74-75). The Appellate Division affirmed per curiam (R. 90-91), two justices dissenting (R. 92-102). The Court of Appeals affirmed without opinion (R. 105) and, upon its remittitur (R. 105-107), the Municipal Court made its order (R. 107) and entered the final judgment (R. 108-110).

In these proceedings there were involved both the coverage of the Act, as applied to the building in which respondent served as watchman, and the effect of the accord and satisfaction. Petitioner does not, however, ask this Court to determine the question of coverage because that issue is not of general importance since it is necessarily limited by the nature of the business conducted by the tenants in a particular building during a limited period long past. But, since petitioner as a bank finds itself in the position of the owner of business property, the validity of accord and satisfaction is of general future importance to it and others similarly situated as well as to the public authorities charged with the administration of the Act. The remittitur of the court below (R. 106) certifies that there were presented to it the questions of law which this Court is asked to review.

Specification of Errors to be Urged.

The Court of Appeals of the State of New York erred:

(1) On the first question—

(a) In holding that an action may be maintained under Section 16(b) of the Act by an employee solely for the recovery of liquidated damages when it is admitted that all overtime compensation was voluntarily paid in full by the employer prior to the institution of suit.

(b) In holding that an employer who voluntarily complied with the Act may be subjected to liquidated damages

to the same extent as one who wilfully refused to comply with the Act.

(c) In ignoring the express wording of the statute and the expressed intent of the Conferees, which contemplates only an action for overtime and liquidated damages, and not liquidated damages alone.

(d) In failing to imply the sufficiency of payment within a reasonable time when the statute is silent as to when payments shall be made; in construing the statute so that the condition of liability becomes delay in payment, rather than the express statutory condition of failure of payment; in implying a requirement of immediate payment and thereby producing a harsh result in direct conflict with the expressed Congressional intent; and in holding that the petitioner has violated Section 7(a) of the Act.

(2) On the second question—

(a) In holding that the release of all further claims and damages under the Fair Labor Standards Act, freely executed by the employee and delivered to his employer at the time he received payment of all overtime compensation due him under the Act. is not a good defense to an action subsequently brought by such employee solely to recover liquidated damages.

(b) In refusing to permit compromise of the employee's claim for liquidated damages in direct conflict with prior decisions of this and other Courts sanctioning compromise of penalties, damages, or other liabilities under similar statutes.

(c) In holding that the liquidated damages as distinguished from overtime compensation is so affected with public interest that it may not be released by the employee.

(d) In holding that the employee may not evaluate for himself the damages suffered as a result of the delay in payment where full overtime compensation is paid.

(e) In failing to give effect to the well established policy of the law to encourage the amicable adjustment of disputes by arm's length negotiation where the statutory purposes have been fully accomplished.

(f) In permitting the respondent to repudiate the settlement and, while still retaining the benefits received thereunder, to institute suit for the recovery of an additional amount without risking the loss of the benefits derived from the settlement in the event that he fails to establish coverage.

(3) On the third question—

(a) In holding that the imposition of liquidated damages does not deprive an employer of property without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

(b) In holding that the statutory phrase "necessary to the production of goods for [interstate] commerce" is a sufficiently definite mandate upon which to predicate liability for damages of 100% despite prior full and voluntary restitution.

Reasons for Granting the Writ.

1. The state court has decided a substantial question of federal statutory law not heretofore determined by this Court.—While—after the trial court had ruled for petitioner—the state appellate courts ruled for respondent, they did so without statement of reasons and with obvious reluctance. In its per curiam the Appellate Term said only that respondent "was employed in the production of goods for

commerce within the meaning of the Fair Labor Standards Act" (R. 79-80) and the Appellate Division said only that (R. 91)

> We appreciate that the result of our decision may seem harsh. The harshness, however, is inherent in the legislation and in the decisions which have construed it.

The only opinion written was that of the two dissenting justices in the Appellate Division sustaining petitioner's contentions (R. 92-102). Although they wrote no majority opinions, each granted leave to appeal (Appellate Term, R. 73-74; Appellate Division, R. 84-85). The Court of Appeals left the parties where it found them—presumably because the question was one of federal law upon which the decisions of the federal courts were hopelessly at variance. In matters of state law the New York courts recognize no such doctrine as they applied in this case, for they permit the release of claims for the wrongful death of an employee (*Davis* v. *N. Y. Central*, 233 N. Y. 242), for injuries under the Workmen's Compensation Act (*O'Brien* v. *Lodi*, 246 N. Y. 41), and of claims under the deficiency judgment act (*City Bank Farmers Trust Co.* v. *McConnell*, 284 N. Y. 686).

2. The decision below is in conflict with a decision of a circuit court of appeals on the same matter.—The decisions of the state courts and of the lower federal courts are conflicting, on the question here involved, in that some of them give effect to accord and satisfaction in the circumstances here presented while others express a rule rendering settlements ineffective for any purpose under any circumstances. The decision below is in direct conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *Guess* v. *Montague*, 140 F. 2d 500, 504 (1943) and the decision of the United States District Court for the Southern

District of New York in *Gangi* v. *D. A. Shulte*, 53 F. Supp. 844 (1943). In these two cases there were, as in the instant case, a dispute as to coverage of the Act, a voluntary payment prior to the institution of suit of the full amount of overtime due if the Act applied (excluding liquidated damages or attorney's fees), and execution of a release by the employee.

In *Fleming* v. *Warshawsky & Co.*, 123 F. 2d 622 (C. C. A. 7, 1941) the Wage and Hour Administrator had brought an injunction proceeding to force the payment of the amount of overtime due, a consent decree was entered but not honored, the Administrator brought contempt proceedings to force the agreed payments of overtime, and the defendants pleaded full releases; but there had been no payment of the full overtime due, the question was whether employees could release all rights, and liquidated damages and attorney's fees were not involved and could not be involved. In *Seneca Coal & Coke Co.* v. *Lofton*, 136 F. 2d 359 (C. C. A. 10, 1943), cert. denied 320 U. S. 772, unlike the instant case, there was no release but liquidated damages and attorney's fees were allowed despite voluntary payment without suit. In *Rigopoulos* v. *Kervan*, 140 F. 2d 506 (C. C. A. 2, 1943)—which the Appellate Division below cited in its per curiam for the proposition that there was "no escape from the statutory language" (R. 91)—the court held that there was no evidence of an accord (p. 508). The payments had been forced by injunction proceedings instituted by the Administrator (47 F. Supp. 576). Similarly, in *Birbalas* v. *Cuneo Printing Industries*, 140 F. 2d 826 (C. C. A. 7, 1944), only after the institution of injunction proceedings by the Administrator and the entry of a consent decree did the defendant make the overtime payments; the defendant also took releases of "all liabilities, penalties, actions, or causes of action" under the Act, after which the employees insti-

tuted the action for liquidated damages and attorney's fees; and the court, lamenting "the law's harshness" as compared with the general public policy favoring the settlement of controversies, doubted the correctness of *Guess* v. *Montague* and held that the statute conferred "a single and entire cause of action which can not be discharged or satisfied by paying merely part of it" (p. 828).

3. **The court below has decided a federal question in conflict with the applicable decisions of this Court and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.**—The decision below ignores (a) the terms and purpose of the statute, (b) the nature of liquidated damages as defined by this Court, and (c) the general federal law relating to settlements.

(a) The statute places no time limit upon voluntary payments of overtime,[4] obviously contemplates that the liquidated damages shall apply only where employees are forced to litigate to recover overtime,[5] and not only contains no provision against settlements but was purged of such a

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[4] Section 7(a) simply requires the payment of overtime. The Administrator has recognized that, "depending on the circumstances," actual payment may be deferred for substantial periods (*Wage & Hour Manual* (1940), p. 120, (1941), p. 165). Here the overtime was voluntarily and fully paid, without request, and promptly upon intimation of possible coverage. The Administrator has recognized restitution to the extent of the statutory wages due (Annual Report, Secretary of Labor, 1941, pp. 147 *et seq.*).

[5] Section 16(b), under which the instant suit was brought, prescribes liquidated damages and attorney's fees only where an employer has violated Section 7 by failure to pay minimum wages or due overtime. That section provides that the employer "shall be liable" for both overtime due and the liquidated damages, but the immediately following sentence plainly ties such double liability to "an action to recover such liability." The legislative history shows that Representative Keller, a member of the Conference Committee, stated that: "The employees can * * * maintain an action in any court to recover the wages due them and *in such a case* the Court shall allow liquidated damages in addition to the wages due equal to

provision before its adoption.[6] Liquidated damages are not essential rights conferred by the Act for every failure of compliance, as demonstrated by Section 17 which authorizes the Administrator to secure injunctions requiring the compliance only with stated provisions (§17 refers to §15 which in turn refers only to §§6, 7, 11, and 14) omitting Section 16(b) relating to liquidated damages, attorney's fees, and costs. They are similarly omitted from the provision for criminal liability. They are not public but personal rights. That Section 16(b) is said to be "mandatory on the courts, regardless of the good faith of the employer or the reasonableness of his attitude" (*Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 581-582) does not mean that settlements by the parties are

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such deficient payment and shall also allow a reasonable attorney's fee and assess the court costs" (83 Cong. Rec. 9264, emphasis supplied). The provision, as he went on to say, was designed to minimize the cost of enforcement by the Government through placing in the hands of employees "the means and ability to assert and enforce their own rights, thus avoiding the assumption by Government of the sole responsibility to enforce the Act" (*id.*). The normal and reasonable reading of the provision is that action may be brought to recover unpaid overtime and, as an incident thereto, liquidated damages as well as attorney's fees and costs. The Administrator has so read it, and refers to the subdivision as one conferring a right of action for overtime "plus" damages, costs, and fees (*Wage & Hour Manual* (1942), p. 729). The Conference Report assumes that liquidated damages may be recovered only where the employee has labored in excess of the maximum hours "without receiving the prescribed payment for overtime" (83 Cong. Rec. 9255). To read the provision as one permitting action for damages *without* overtime is an obvious perversion of language.

[6] There is not the slightest intention in the statute that settlements are prohibited. Indeed, there was eliminated from the measure a provision stating that

> Sec. 20—(b) Any contract, agreement, understanding, condition, stipulation, or provision binding any person to waive compliance with any provision of this Act or with any regulation or order thereunder shall be null and void. (Senate Rep't No. 844, 75th Cong., 1st Sess., 1937.)

So that Congress—certainly to the extent of accord and satisfaction upon the voluntary payment of overtime in full—must have contemplated settlements of liability.

outlawed; for that was said in a case where there was neither payment nor accord and the employee was compelled to litigate his right to overtime.

(b) As defined by this Court liquidated damages in their very nature are personal and designed as compensation for actual damages difficult of proof, rather than as penalty or punishment. *Overnight Motor Co.* v. *Missel, supra,* pp. 583-584. Since the purpose of double damage statutes is to secure adequate "restitution" and to make the injured party "completely whole" (*United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 551-552), no reason appears why such a party may not accept full voluntary restitution and waive damages, fees, and costs at least where—as here—he has not been put to the necessity of making claims or litigating issues. The provisions so waived are purely remedial (*Huntington* v. *Attrill*, 146 U. S. 657, 668 *et seq.*; *cf. Helvering* v. *Mitchell*, 303 U. S. 391, 401); *Stockwell* v. *United States*, 13 Wall. 531, 551, so that the party for whose benefit they exist or who may exercise them needs no authority to waive them where the party liable offers prompt restitution and renders exercise of remedial rights unnecessary. Since multiple damages are designed to be "remunerative" and afford "indemnity for loss" (*Atchison etc. Ry.* v. *Nichols*, 264 U. S. 348, 352; *Stockwell* v. *United States*, *supra*, p. 547), no reason appears why the beneficiary may not waive the excess over a voluntary payment which makes him whole. Since they are provided where damages are difficult to measure and hence conjectural (*Brady* v. *Daly*, 175 U. S. 148, 154; *Missouri Pacific Railway Co.* v. *Humes*, 115 U. S. 512, 521, 522-523), the purpose of the law is more exactly met where the parties freely reach an accord and satisfaction.

(c) Multiple damages are provided in many situations under federal law. Settlements have been honored not

only in those cases as to the excess over restitution—as here involved—but also with respect to the basic liability. Seamen—traditionally regarded as the wards of admiralty—may release liability for personal injuries executed—as here (R. 23-25, 54, 65-66)—freely and without coercion or deception. *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 246-248; *The S. S. Standard*, 103 F. 2d 437 (CCA 2, 1939). There may be a settlement and release of compensation liability under the Federal Employers' Liability Act. *Flynn* v. *N. Y., N. H. & H. R. Co.*, 283 U. S. 53 (per Holmes, J.); *Mellon* v. *Goodyear*, 277 U. S. 335. Upon equitable principles, a release may be effective respecting treble damages under the Sherman Act (*Radio Corp.* v. *Raytheon Co.*, 296 U. S. 459, 462-463) at least unless obtained by deceit, fraud, or trickery (*Westmoreland Asbestos Co.* v. *Johns-Manville Corp.*, 39 F. Supp. 117 (S. D. N. Y. 1941)). A release will be honored notwithstanding the treble damage right accorded under the patent laws for infringement. *E. I. S. Mfg. Co.* v. *Supco Products Corporation*, 26 F. Supp. 758, 760-761 (S. D. N. Y. 1938).

This being the general state of the law, Congress must be presumed to have legislated with it in mind. As stated in note 6 *supra*, the measure which became the Act here involved was purged of a provision against waivers. Congress has rarely disturbed the general law by legislating expressly upon the subject. Under the Seamen's Act it has required only that releases be executed before a shipping commissioner (46 U. S. C. § 644) and has provided that "any court having jurisdiction may upon good cause shown set aside such release and take such action as justice shall require" (*id.*, §597). *Cf. Garrett* v. *Moore-McCormack Co.*, *supra*, p. 247; *The S. S. Standard*, *supra*, p. 439; *Cox* v. *Lykes Brothers*, 237 N. Y. 376 (per Cardozo, C. J.). In the Longshoremen's and Harbor Workers' Compensation Act, Congress prohibited waivers of compensation (33

U. S. C. §915(b)) except within limitations and upon official approval (*id.*, §908(i)). As this Court has recently said in another, but somewhat similar, situation: "If Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made." *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329; *cf. Scripps-Howard Radio* v. *Comm'n*, 316 U. S. 4, 13 *et seq.*

4. There is involved a final judgment by the highest court of a state in a cause in which there is drawn in question the validity of a statute of the United States.—Petitioner's position in the courts below was that, because of the admittedly vague and uncertain coverage of the statute, the requirement that an employer might concede coverage and make restitution only at the peril of double liability violates the due process clause of the Fifth Amendment (R. 106). The point is material whether regarded as requiring, in the circumstances here presented, either the invalidation of statutory double liability or a construction of the Act which will avoid the constitutional issue.

This Court and the legislative proponents have said of the statute here in question that

> To search for a dependable touchstone by which to determine whether the employees are engaged in commerce or in the production of goods for commerce is as rewarding as an attempt to square the circle. (*Kirschbaum Co.* v. *Walling*, *supra*, p. 520.)
>
> "Necessary" is colored by the context not only of the terms of this legislation but of its implications in the relation between state and national authority. (*Id.*, p. 525.)
>
> This act combines everything, and is an attempt to take advantage of whatever theories may prevail on the Court at the time that the case is heard. (Robert H. Jackson, *Hearings before the Senate Committee on*

Education and Labor and House Committee on Labor on S. 2475 and H. R. 2700, 75th Cong., 1st Sess., 1937, p. 54.)

Other essential definitions in the statute are similarly uncertain.[7] The word "necessary", Chief Justice Marshall said,

> has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed, by these several phrases. (*McCulloch* v. *Maryland*, 4 Wheat. 316, 414.)

Yet this is the standard to which petitioner has been held required to conform upon pain of double liability.

The *Kirschbaum* case raised the possibility of coverage but of course could not settle applicability to individual properties. Prior thereto the Appellate Division had held there was no coverage of building service employees (*Killingback* v. *Garment Center Capital, Inc.*, 259 App. Div. 691) and the Court of Appeals denied leave to appeal (248 N. Y. 818). See also *Pederson* v. *Fitzgerald Construction Co.*, 262 App. Div. 655, affirmed 288 N. Y. 687. The United States District Court for the Southern District of New York dismissed the companion of the *Kirschbaum* case instituted by the Administrator (*Fleming* v. *Arsenal Bldg. Corporation*, 38 F. Supp. 207 (1941)) and the Circuit Court of Appeals in reversing conceded that "so far the score is

[7] "In determining whether * * * underground travel constitutes compensable work or employment within the meaning of the Fair Labor Standards Act, we are not guided by any precise statutory definition of work or employment. *Tennessee Coal Co.* v. *Muscoda Local*, 321 U. S. 590, 597. "Presumably [with reference to the definition of regular rate in the statute] Congress refrained from attempting such a definition because the employment relationships to which the Act would apply was so various and unpredictable." *Walling* v. *Belo*, 316 U. S. 624, 634.

four to one against the view we take" (125 F. 2d 278, 281). See also *Cecil* v. *Gradioson* (Ohio), 40 N. E. 2d 598 (1941); *Robinson* v. *Massachusetts Mutual Life* (Tenn.), 158 S. W. 2d 441 (1941).

When upon the decision of the *Kirschbaum* case it became possible that in the exigencies of litigation petitioner's building property might be held subject to the coverage of the statute, petitioner voluntarily and fully paid the overtime due if the statute were to apply. In such circumstances, to hold that petitioner is required to pay double compensation becomes so unreasonable as to deprive petitioner of due process of law. To be sure, the double liability provided by the statute is designed to afford compensation rather than to be a penalty (*Overnight Motor Co.* v. *Missel, supra*, pp. 583-584) but, if applied in the situation here presented, it becomes a double liability which can be considered "compensation" only through fiction. This is not a case where a statute is drawn in broad terms to guide an administrative agency in issuing specific regulations (*cf. United States* v. *Pennsylvania R. R. Co.*, 242 U. S. 208, 237-238) operative only for the future (*cf. Security Adm'r* v. *Quaker Oats Co.*, 318 U. S. 218, 228). It is instead a statute which requires absolute compliance upon pain of double liability. Where the coverage of such a statute is uncertain—as is admittedly true here—a long line of decisions of this Court holds it violative of due process.

Thus vaguely worded state antitrust acts have been held invalid. *International Harvester Co.* v. *Kentucky*, 234 U. S. 216 (per Holmes, J.); *Collins* v. *Kentucky*, 234 U. S. 634 (per Hughes, J.); *American Machine Co.* v. *Kentucky*, 236 U. S. 660 (per McKenna, J.); *Cline* v. *Frink Dairy Co.*, 274 U. S. 445 (per Taft, C. J.). The Food Control Act of 1917, applicable to "any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries";

was similarly held void with reference both to the penalties imposed (*United States* v. *Cohen Grocery Co.*, 255 U. S. 81) and the invalidation of contracts thereunder (*Small Co.* v. *American Sugar Ref. Co.*, 267 U. S. 233, 237, 239-240). A state statute requiring contractors to pay their workmen not less than the "current rate of per diem wages in the localities where the work is performed" was held void for uncertainty. *Connally* v. *General Const. Co.*, 269 U. S. 385 (Holmes and Brandeis, JJ., concurring in the result). In holding invalid for uncertainty an Oklahoma statute prohibiting waste in the production of petroleum, this Court pointed out that "there is nothing to support defendants' suggestion that the regulatory provisions of the Act do not become operative until the commission has defined permissible production". *Champlin Rfg. Co.* v. *Commission*, 286 U. S. 210, 242-243. A state act defining a gangster to be anyone previously convicted of crime "known to be a member of any gang consisting of two or more persons" is violative of due process. *Lanzetta* v. *New Jersey*, 306 U. S. 451. Of course statutes may involve some difficulty of application without being invalid. *Cf. Old Dearborn Co.* v. *Seagram Corp.*, 299 U. S. 183, 196-197. But this Court has pronounced the Act here involved to be without a dependable touchstone by which to determine coverage.

5. The court below has decided an important question of federal law which should be decided by this Court.—The question here presented is important to all the vast number of employers subject or possibly subject to the coverage of the Fair Labor Standards Act. It affects not only owners of business premises but every mine operator subject to portal-to-portal coverage, insurance companies held to be subject to the commerce power, producers for interstate commerce who own buildings in which nonproduction employees work (*cf. Borella* v. *Borden Co.*, — F. 2d —, Second

Circuit, decided July 28, 1944), or any other employer who may be subjected to coverage not presently recognized.

The question is important to the Administrator of the statute because, in extending coverage and resolving disputes through equity proceedings, employers could consent to decrees only upon pain of double liability rather than actual restitution. Litigation will thus be intensified. As Senator Walsh of the Conference Committee stated when the measure was before Congress,

> To be successful, the law, with its commendable humanitarian objects, must be administered with the caution, care and sympathy of a physician and not with the autocracy and force of a police officer. (83 Cong. Rec. 9176-9177).

However, the result reached by the court below deprives the Administrator of much of his opportunity to execute the statute with care for the larger public interests.

The question is of importance to employees whom the Act seeks to protect because under the conclusion reached below no employer may make restitution or agree upon a settlement without liability for liquidated damages. As the Circuit Court of Appeals for the Second Circuit has said in sustaining the validity of releases upon settlements of seamen's wages under the Seamen's Act: "Any other result would be no kindness to the seaman, for it would make all settlements dangerous from the employer's standpoint and thus tend to force the seaman more regularly into the courts of admiralty." *The S. S. Standard, supra*, p. 439.

The question is of importance to good government and public morals. The Appellate Division below and numerous other courts have pronounced as harsh and unreasonable the rigid imposition of double liability. That employees may accept actual money restitution and, without returning

it and without expense for counsel fees, proceed to litigate for double liability opens the door to a vast litigious business. That anyone should profit from double liability where restitution has been made voluntarily and in full runs counter to common and accepted ideas of good conduct.

It is respectfully submitted that there is here presented a proper occasion for the exercise of the supervisory power of this Court.

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APPENDIX.

Pertinent provisions of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; 29 U. S. C. § 201 et seq.) read as follows:

Sec. 3 (j). "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

Sec. 7 (a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Sec. 16 (b). Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or them-

selves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.